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Supreme Court, U.S.
FILED

No.

SUPREME COURT OF [illegible]

October [illegible],

WAYNE SNOW, JR., CHAIRMAN,
Georgia State Board of Pardons and Paroles,

Petitioner,

C[illegible]

[illegible] of Respondents [illegible]

[illegible]

[illegible]

BEST AVAILABLE COPY

No._____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

WAYNE SNOW, JR., CHAIRMAN,
Georgia State Board of Pardons and Paroles,

Petitioner,

v.

C. T. AKINS and JAY M. FATE,

Respondents

Brief of Respondents in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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Statement of the Case

By order of the Honorable J. L. Edmondson, Judge, United States Court of Appeals for the Eleventh Circuit, dated April 16, 1990, the undersigned, Howard O. Hunter, was appointed as counsel for the respondents C. T. Akins and Jay M. Fate pursuant to Eleventh Circuit Addendum Five to file a supplemental brief on their behalf, to present oral arguments, and to represent them in further proceedings before that Court. The respondents were granted leave to proceed in forma pauperis by both the United States District Court for the Northern District of Georgia and the United States Court of Appeals for the Eleventh Circuit.

The Petitioner's Statement of the Case outlines the general history of the case. There are certain additional facts pertinent to the disposition of the Petition.

There is no dispute about the central facts of this case. The respondents Akins and Fate are both inmates at the Georgia State Prison in Reidsville, Georgia. Each is serving a life sentence. Akins was sentenced in 1973 for a crime committed in 1972. Fate was convicted of a crime committed in 1977 and

sentenced that same year. At the time each crime was committed the rules of the Georgia State Board of Pardons and Paroles (the "Board") provided for first consideration of those serving life sentences after the completion of seven years in prison.[1] The seven year time period for initial consideration has not been changed. When respondents were sentenced the Board's rules provided that a prisoner serving a life term would be eligible for parole consideration annually after an initial denial. Akins was denied parole in 1980 when he was first eligible for consideration. He was reconsidered annually from 1980 to 1986 and denied each time. Fate's initial consideration came in 1984. He was denied parole and was considered again in 1985 when he also was denied parole.

In 1985 the Board amended the rule on eligibility for reconsideration after an initial denial to provide that "Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least <u>every eight years</u>."[2] In 1986 both Akins and Fate were deferred from

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1 See Rule 475-3-.06, Rules of the Georgia Board of Pardons and Paroles.

2 Rule 475-3-.05, paragraph 2, Rules of the Georgia Board of Pardons and Paroles.

eligibility to be reconsidered under the new rule for up to eight years.

The petitioner introduces a discussion of facts on pages 8-11 of the Petition that are not part of the undisputed record in this case on which the decisions of the District Court and the Eleventh Circuit are based. See Order of the District Court, Appendix 2-5, Petition. Although the petitioner's discussion ultimately supports the respondents' position as made clear in the argument which follows, it is important to note that there is a limited record of undisputed facts and that the controversy concerns a single change in Georgia's rules on mandated eligibility for parole reconsideration after an initial review and denial.

The respondents argued in the courts below that the change in the Board's rules from a requirement that they be eligible for reconsideration annually to a requirement that they be eligible for reconsideration every eight years was a substantial change in the nature of their punishment in violation of the ex post facto clause of the United States Constitution, Article I, section 9, clause 3. The respondents

made certain other claims and advanced certain other arguments in the District Court. That Court granted summary judgment to the petitioner on all claims. On appeal to the Eleventh Circuit the sole issue was whether the Board's rule change on eligibility for parole reconsideration violated the ex post facto clause. The Court of Appeals held, in a unanimous decision, that the rule change did violate the ex post facto clause and reversed the decision of the District Court.

REASONS FOR DENYING THE WRIT

A. THE DECISION OF THE ELEVENTH CIRCUIT IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL AND IS NOT CONTRARY TO THE RECENT DECISION OF THIS COURT IN COLLINS V. YOUNGBLOOD, 497 U.S. _____, 110 S. CT. 2715, 111 L. ED. 2d 30 (1990).

1. The change in the rule governing eligibility for consideration for parole was an increase in punishment within the meaning of Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 (1798).

In Collins v. Youngblood this Court reaffirmed the understanding of the ex post facto clause set forth in the 1798 opinion in the case of Calder v. Bull, 3 Dall. 386, 1 L. Ed. 648 (1798). The ex post facto clause is violated by "Every law that changes the punishment, and inflicts a greater punishment,

than the law annexed to the crime, when committed." Id., 3 Dall. at 390.

There is no dispute that when the respondents committed the crimes for which they were convicted, the Board's rules provided that prisoners serving life sentences would be eligible to be considered for parole after seven years, and, if denied, annually thereafter. In 1985 the rule on eligibility for reconsideration was changed to the substantial detriment of the respondents.[3] When they committed the crimes for which they received life sentences the Board was required to reconsider them for parole annually after an initial denial. Now the Board is required to consider them no more frequently than every eight years. The respondents have made no claim of a right to parole or of a "liberty interest" in parole. Their position, and that of the Eleventh Circuit, is that the 1985

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[3] Apparently there was a change in 1979 for mandated reconsideration every three years, but the record indicates that the respondents received annual reconsideration until the 1985 rule change. In any event the rule in effect at the relevant time required annual reconsideration.

change in the Board's rule on eligibility for reconsideration after an initial denial was a substantial increase in their punishment.

It has long been accepted that parole eligibility is part of the sentence for a crime and that disadvantaging retrospective changes in parole eligibility rules violate the ex post facto clause. See Schwartz v. Muncy, 834 F. 2d 396 (4th Cir. 1987); Burnside v. White, 760 F. 2d 217 (6th Cir. 1985); Beebe v. Phelps, 650 F. 2d 774 (5th Cir. 1981); Shepard v. Taylor, 556 F. 2d 648 (2d Cir. 1977); Rodriguez v. United States Parole Commission, 594 F. 2d 170 (7th Cir. 1979). See also Lindsey v. Washington, 301 U.S. 397 (1937). In the case of Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 658 (1974) this Court stated:

> Although, of course, the precise time at which the offender becomes eligible for parole is not part of the sentence, ... , it is implicit in the terms of the sentence. And because it could not be seriously argued that sentencing decisions are made without regard to the period of time a defendant must spend in prison before becoming eligible for parole, or that such decisions would not be drastically affected by a substantial change in the proportion of the sentence required to be served before becoming eligible, parole eligibility can be properly viewed as being determined - and deliberately so - by the sentence of the District Judge.

In dictum this Court went on to state that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the ex post facto clause ... of whether it imposed a 'greater or more severe punishment than was prescribed by law at the time of the ... offense.'" 417 U.S. at 663, citing Rooney v. North Dakota, 196 U.S. 319, 325 (1905).

The petitioner argues that parole eligibility rules are not part of the sentence and relies on two state court decisions: In re Jackson, 39 Cal.3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (1985) and Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989). This reliance is misplaced. Jackson committed a violent crime in California in 1961. At that time there was no guarantee as to the frequency of parole consideration. The parole board had the discretion to consider any prisoner after six months of a sentence. California case law subsequently required "periodic" consideration. In re Schoengarth, 66 Cal.2d 295, 57 Cal. Rptr. 600, 425 P.2d 200 (1967). In 1972 the parole board instituted a policy of annual reconsideration with the provision that extreme cases might be reviewed every two or three years. In re Minnis, 7 Cal.3d 639, 102 Cal. Rptr. 749, 498 P.2d 997 (1972). The legislature enacted a statute in

1977 providing for annual parole suitability hearings. West's Ann. Cal. Penal Code Section 3041.5(b)(2). This was amended in 1982 to allow the board to do biannual reviews if it was reasonable to expect that parole would not be granted at the next annual review but the board had to state reasons for the delay. West's Ann. Cal. Penal Code section 3041.5(b)(2)(A). The statutory requirement for at least biannual review was more favorable to Jackson than the parole regulations were at the time of his crime in 1961 notwithstanding the relatively modest modification of the 1977 statute by the 1982 amendment. There had been no retrospective increase in punishment.

The Supreme Court of South Carolina in Gunter reviewed an amendment to that state's parole regulations which changed the eligibility of persons convicted of violent crimes from annual reconsideration to biannual reconsideration. The Court held that there was no violation of the ex post facto clause and relied exclusively on In re Jackson for that conclusion. There was a passing reference to Weaver v. Graham, 450 U.S. 24 (1981), but no mention of the many cases holding that changes in eligibility for parole consideration are changes in punishment which violate the ex post facto clause.

The petition also argues that Rodriguez v. United States Parole Commission, 594 F.2d 170 (7th Cir. 1979) does not support the decision of the Eleventh Circuit. To the contrary, the Rodriguez opinion fully supports the Eleventh Circuit's decision in this case. The discussion of Rodriguez in the Petition is not precisely accurate.

Mr. Rodriguez was convicted of perjury and fraud for acts done in 1974 and 1975. He was given a sentence of two years. Rodriguez received a parole hearing after three months under a general policy of early review. He also was subject to a Parole Commission regulation that gave federal inmates the right to a meaningful parole review after serving one-third of a sentence. In late 1977 the Parole Commission amended its regulations to provide that it could schedule re-hearings as late as 18 months after the date of a hearing and denial without regard to the one-third point review. The effect of the change was to delay Rodriguez's second hearing from the eighth month of his sentence (the one-third point) until the twenty-first month. The Court of Appeals for the Seventh Circuit held that this change violated the ex post facto clause because it substantially increased the time before Rodriguez would be eligible to be considered for parole. In his case the

subsequent hearing date was almost at the end of his sentence. The Seventh Circuit reaffirmed the general understanding that parole rules are part of the punishment associated with a crime[4] and went on to discuss the concept of eligibility for consideration:

> Eligibility in the abstract is useless; only an unusual prisoner could be expected to think that he is not suffering a penalty when even though he is eligible for parole and might be released if granted a hearing, he is denied that hearing. 594 F.2d at 176.

The United States Court of Appeals for the Fourth Circuit decided a case in 1989 that bears a number of similarities to this case. Fender v. Thompson, 883 F. 2d 303 (4th Cir. 1989). Fender was found guilty of several serious offenses in 1973 and was sentenced to life imprisonment in Virginia. At that time prisoners serving life sentences became eligible for parole

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4 The Seventh Circuit also referred to Congressional understandings of parole as part of the sentence. See, e.g. H. R. Rep. No. 94-838 (Conf. Report), 94th Cong., 2d Sess. 26, [1976] U.S. Code Cong. & Admin. News, pp. 351, 358; S. Rep. No. 94-369, 94th Cong., 2d Sess. 15-16, [1976] U.S. Code and Cong. & Admin. News, pp. 335, 337, cited 594 F.2d at 175.

consideration after fifteen years.[5] In 1985 the parole statute was amended to provide that "any person sentenced to life imprisonment who escapes from a correctional facility or from any person in charge of his custody shall not be eligible for parole." Va. Code, section 53.1-151(B) (1988). Fender escaped in 1987, but was recaptured. He entered a guilty plea and was sentenced to three years on the escape charge, the sentence to run consecutively with his life sentence. The Department of Corrections then issued an order that Fender was no longer eligible for parole consideration. In a thoughtful opinion by Judge Phillips, the Fourth Circuit found that the application of the amended statute to Fender violated the ex post facto clause.

> [Courts] have unvaryingly refused to permit the retrospective application of new or amended statutes or administrative rules which purported, for example, to alter preexisting criteria for the determination of parole eligibility, Marshall v. Garrison, 659 F. 2d 440, 444-46 (4th Cir. 1981); or revoke accrued 'good time' credits upon the revocation of probationary release granted on the sentence for an offense committed before enactment of the statute ... or, as a practical matter, simply rescind prior parole eligibility altogether .... The principle underlying each of these decisions is that the retrospective application of a statute modifying or revoking parole eligibility would " ... substantially

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5 Va. Code, section 53-251(3) (1970).

> alter the consequences attached to a crime already completed and therefore change the 'quantum of punishment'." 883 F. 2d at 305-06, citing Weaver v. Graham, 450 U.S. 24, 33 (1981) and Dobbert v. Florida, 432 U.S. 282, 293-94 (1977).

Virginia argued that the statute merely imposed an enhanced punishment for the crime of escape and was similar to a recidivist statute. Furthermore, it antedated Fender's escape and, therefore, he was on notice of the possible punishment. The Court rejected Virginia's arguments. The revocation of parole eligibility affected the sentence for the earlier crime, not for the later crime of escape. Fender may have been aware of the consequences of the crime of escape at the time of the later crime, but he was not aware, and could not have been aware, in 1973 that an escape in 1987 would have a direct effect on the sentence he received in 1973.

Judge Phillips relied heavily on Schwartz v. Muncy, 834 F. 2d 396 (4th Cir. 1987). Schwartz was convicted of felonies in Virginia in 1968, 1978 and 1982. The dispute involved his eligibility for parole consideration on the 1978 conviction. In 1979 Virginia enacted a statute that imposed additional restrictions on parole eligibility for repeat offenders. Schwartz was paroled on his 1978 conviction, but his parole was revoked after his arrest and conviction on the 1982 felony.

Under the 1979 law Virginia treated him as a "third offender" for purposes of computing his parole eligibility under both the 1978 and 1982 sentences. The Fourth Circuit held that the application of the 1979 law to his eligibility for parole on his 1978 conviction violated the ex post facto clause. "The proposition for which Schwartz stands, therefore, is this: statutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility - notwithstanding that the conduct purportedly triggering application of the statute occurred after its enactment." Fender v. Thompson 883 F. 2d at 306. See also, Gluckstern v. Sutton, 574 A.2d 898 (Md. 1990).

The Fender case deserves close analysis. There was no claim made by Fender of any right to parole. There was no claim of a liberty interest in parole. There was no challenge to the proposition that parole is a matter of discretion for the state. There was no argument that the Parole Board could not take his escape into account in deciding whether he was a good candidate for release on parole. The sole point was that the subsequent law changed the rules on eligibility for consideration by the Board. In 1973 when Fender committed the crimes and was sentenced to life imprisonment, he was eligible

for parole consideration fifteen years later in 1988. An escape attempt in the meantime might weigh heavily against a favorable consideration, but the Board was not prevented from considering him. Virginia then changed the rules, and after his 1987 escape he was no longer eligible for consideration; he had no hope for parole under any circumstances.

The change in this case is not quite as drastic. The respondents have not been denied the opportunity ever to be considered for parole, but the rules have changed to their substantial detriment. When appellants Akins and Fate were sentenced, each was entitled to be considered for parole after seven years and annually thereafter. The Georgia Board subsequently changed the rules to provide that they need not be considered more frequently than every eight years. There is a great deal of difference between mandated consideration annually and mandated consideration once every eight years. It is this change in the rules, applied after the commission of the crime, after conviction, after sentencing, and after service of a substantial portion of their sentences that violates the ex post facto clause.

2. A disadvantaging change in parole eligibility may violate the ex post facto clause even though there is no "liberty interest" in parole.

The respondents have not sought to establish a "liberty interest" in parole nor have they argued that they have a right to demand parole. A change in parole eligibility rules may violate the ex post facto clause even though it does not impair a vested right or a liberty interest. This Court stated in Weaver v. Graham, 450 U.S. 24, 30-31 (1981):

> The presence or absence of an affirmative, enforceable right is not relevant, however, to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished occurred. Critical to relief under the Ex Post Facto Clause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offence.

At issue in Weaver was a change by the state of Florida in the method for calculating "gain time" for purposes of parole. "Gain time" is a reward for good behavior that the Florida parole board could use to shorten a sentence. Florida argued that its changes, which reduced the time that could be gained through good behavior, did not violate the ex post facto clause

because: (i) parole is discretionary; (ii) the complainant had not shown that there had been any change in the time he might have to serve; (iii) the complainant's sentence was fifteen years and any reduction was a matter of grace; and (iv) the "gain time" law was not part of the sentence. This Court rejected Florida's arguments because the change affected an important determinant in the actual length of the sentence, a determinant that was known to the trial judge at the time sentence was imposed. Whether or not the complainant ultimately might serve the same length of time was irrelevant. The amendment to the law altered "the consequences attached to a crime already committed." 450 U.S. at 33.

3. The decision by this Court in Collins v. Youngblood to overrule Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898) does not affect the decision of the Eleventh Circuit in this Case.

In Collins this Court reaffirmed Calder v. Bull and overruled two other cases, Kring v. Missouri, 107 U.S. 221 (1883) and Thompson v. Utah, 170 U.S. 343 (1898). The petitioner argues that Collins, therefore, affects the decision of the Eleventh Circuit in this case because the change in the rule of the Georgia board was "procedural." The petitioner is incorrect both as to the effect of this Court's decision to

overrule Kring and Thompson and as to the characterization of the change in the parole eligibility rule applicable to respondents.

The Kring case involved a change in Missouri's procedure for handling guilty pleas to murder charges. This Court adopted an expansive view of the ex post facto clause to find a constitutional violation. The facts of that case have little, if any, relevance to this case. Furthermore, the respondents do not argue that the parole eligibility rule change at issue here falls within the definition of the ex post facto clause adopted in Kring. To the contrary, the rule change amounts to an increase in punishment within the third part of the definition in Calder v. Bull, discussed above.

The question in the Thompson case was whether a reduction in the size of the trial jury from twelve to eight in a criminal case violated the ex post facto clause. This Court held that it did because there was a "material alteration" of the situation to the disadvantage of the criminal defendant. In Collins this Court correctly noted that the result in Thompson was an anomaly and that the definition of the ex post facto clause in that case was substantially broader than the

definition in Calder v. Bull. This case has nothing to do with the size of juries; the dispute concerns a retrospective change in the punishment for a crime to make the punishment more burdensome.

Similarly, the facts in Collins are fundamentally different from the facts of this case. Collins involved a change in Texas appellate practice to allow appellate courts to reform improper criminal verdicts. Tex. Code Crim. Proc. Ann., Art. 37-10(b) (Vernon Supp. 1990). The change allowed an appeals court to reform the complainant's own verdict to delete an improper fine. This change in the law had nothing to do with the definition of a crime, the defenses available to a crime, nor the punishment for a crime. The new law affected the power of Texas appellate courts in relation to Texas trial courts.

The petitioner refers to the change in Georgia's parole eligibility rule as "procedural". Referring to a rule change as "procedural" does not make it so if it affects a substantial interest.

The grant of parole by the State of Georgia to a convicted criminal is a discretionary act. The respondents do not contend otherwise. The factors to be weighed by the parole authorities in deciding whether to grant parole are discretionary and may vary from person to person depending upon a wide variety of facts and circumstances. The point in this case, however, is that the State has changed the rule on eligibility to be considered from a mandated annual reconsideration after initial denial to a mandated reconsideration every eight years. That is an eight fold increase in the time between mandated dates of eligibility for consideration. Whether either of these respondents would or would not receive favorable consideration is irrelevant; their eligibility for consideration has been changed retrospectively and made substantially more burdensome.

On page 9 of the Petition, petitioner characterizes the respondents' reliance upon the State's own rule of eligibility for parole consideration as "reliance upon ... caprice or unlikely windfall." The characterization is the petitioner's, but, in fact, the respondents each were considered for parole after serving seven years pursuant to Rule 475-3-.06 and each was denied parole. Each was reconsidered annually until 1985

when each was put over under the new rule for up to eight years before further reconsideration. See Order of the District Court, Petition, Appendix 2-5. Under the rule in effect until 1985 there was no "caprice."

The State's reference to Damiano v. Florida Parole and Probation Commission, 785 F.2d 929 (11th Cir. 1986) is inapposite. (Petition, p. 11) Damiano and similar "guidelines" cases involve factors to be considered in determining whether parole should or should not be granted. Damiano does not deal with the issue of eligibility to be considered.

B. CONCLUSION

This is a simple case which affects a relatively small number of people, and the decision of the Eleventh Circuit is consistent with the prior decisions of this Court and those of other federal Courts of Appeal which have considered similar cases.

In addition to the respondents Akins and Fate, those who are affected by the Eleventh Circuit's decision are inmates serving life sentences in the State of Georgia for crimes committed prior to the effective date in 1985 of the amendment

to Rule 475-3-.05, paragraph 2 of the Rules of the Georgia Board of Pardons and Paroles. The relief that the State must grant under the Eleventh Circuit's ruling is to provide an opportunity for reconsideration for parole of each such inmate in accordance with the rule in effect at the time of the crime of which he was convicted. Any inmate serving a life sentence for a crime committed after the effective date of the 1985 rule need be considered no more frequently than every eight years after an initial review and denial.

The decision of the Eleventh Circuit is consistent with this Court's holdings in Calder v. Bull and Collins v. Youngblood. Therefore, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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Certificate of Service

The undersigned hereby certifies that he has served the foregoing brief upon the Petitioner in this case by depositing three copies thereof in the United States Mails, proper first class postage prepaid, addressed to his counsel of record for service of process, to wit:

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This 5th day of June 1991

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